United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

OCT 1 2002

Mr. David Kaiser
Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20190

Dear Mr. Kaiser:

On October 3, 2002, the Department of the Interior submitted comments to you in response to an Advanced Notice of Proposed Rulemaking (ANPR) published in the Federal Register on July 2, 2002. The ANPR lists six specific areas of possible revision to the CZMA consistency regulations for which public input was sought. Our letter listed those six items and provided comments for each in the order in which they were presented in the ANPR.

We have detected an error in the last sentence of our comment in response to item number two, identified as Roman Numeral II, on page three of our letter. We therefore request that you delete the last paragraph of our comments under Roman Numeral II and substitute the following two paragraphs:

"An appeal before the Secretary will include all of the information that was before the State when it objected to consistency. Further, the administrative record will also include all of the environmental and other information available to the MMS used to adjudicate the merits of the underlying permit that is the subject of the appeal. We see no reason why the appeal process should be delayed in order to obtain additional information to add to the administrative record. We therefore suggest that a rule be promulgated that the administrative record will close within 90 days of the filing of the appeal, and the notice indicating the closure of the record required by 16 U.S.C. 1465(a) will be published no later than 15 days after the closure of the record.

Section 319 of the CZMA, 16 U.S.C. 1465(a), requires the Secretary of Commerce to publish a notice in the Federal Register indicating when the decision record has been closed on any appeal to the Secretary. No later than 90 days after publication of that notice, the Secretary must either issue a final decision in the appeal, or publish a second notice explaining why the decision cannot be issued within the prescribed 90-day period. In the latter case, the decision must be issued no later than 45 days after the date of the publication of that notice. Because

these deadlines are prescribed by statute, promulgation of regulations is not necessary."

We appreciate your assistance in this matter. If there is any further information that we can furnish you in regard to the ANPR or our comments, we will be happy to provide it.

Sincerely,

Fred E. Ferguson
Associate Solicitor for Mineral Resources

United States Department of the Interior

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OCT 3 2002

Mr. David Kaiser
Coastal Programs Division
Office of Ocean and Coastal Resource Management
National Oceanic and Atmospheric Administration
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20190

Dear Mr. Kaiser:

On July 2, 2002, the National Oceanic and Atmospheric Administration (NOAA) published in the Federal Register an Advanced Notice of Proposed Rulemaking (ANPR). This notice advised the public that NOAA was considering a limited revision of the comprehensive rulemaking of the Coastal Zone Management Act (CZMA) Federal consistency and Secretarial appeal procedures that was promulgated on December 8, 2000. The ANPR requests public comment on six specific areas under consideration for revision. The summary of the ANPR states that the primary focus of the ANPR is to review consistency regulations particularly for energy development on the Outer Continental Shelf (OCS). As the principal federal agency responsible for OCS energy development, the Minerals Management Service welcomes the opportunity to work with NOAA to develop meaningful and necessary revisions to the consistency regulations that balance the interests of the States with the need to develop offshore energy resources.

We appreciate NOAA's efforts to revise the regulations relating to CZMA consistency. However, the proposed revisions do not go far enough to address other important problems that exist in the regulations. Therefore, we are including correspondence from the Associate Solicitor, Division of Mineral Resources, Office of the Solicitor, dated January 14, 2002, and March 25, 2002, that discusses the problems that continue to plague the consistency regulations. The March 25, 2002 letter includes draft regulatory language that would cure the major problems. Resolution of the issues set forth in these letters is critical to an efficient, predictable offshore energy program that fairly recognizes the Congressional intent to balance the need for orderly development of offshore energy with the legitimate coastal interests of the State.

We believe that the issues raised in the attached letters, while not mentioned in the ANPR, merit reexamination. We look forward to resolving these issues with NOAA through participation in the working groups recently organized by Assistant Secretary Watson, Assistant

Secretary Manson and VADM Lautenbacher. The following comments address the six specific areas for which NOAA requested comments in the ANPR.

I. *Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing federal agencies and the industry of the information requirements.*

NOAA states in the ANPR that "[d]espite this direction for information requirements, issues continue to arise as to the adequacy and types of information requested by and/or provided to the states." The "direction" to which the ANPR refers is given at 15 CFR 930.77(a)(2), which provides that the State will use the information submitted pursuant to the Department of the Interior OCS operating regulations, OCS information program regulations and "necessary data and information" as described at 15 CFR 930.58. The latter section states, in part, that necessary data and information shall include ". . . comprehensive data and information sufficient to support the applicant's consistency certification." This requirement is open to broad interpretation and has been used as a basis for continual requests by the States for additional information "to support the applicant's consistency certification."

The MMS operating regulations at 30 CFR 250.203 (for exploration plans) and 30 CFR 250.204 (for development and production plans) set forth a comprehensive list of very specific requirements for information and data that must be submitted with an OCS plan for MMS approval. Information submitted with the OCS plan, which serves as an adequate basis upon which to approve all of the details of the underlying plan, certainly should be adequate for the states to determine consistency with their enforceable policies. Unreasonable requests for more information result in substantial costs and delays that result in the abandonment of projects that were otherwise economically and environmentally sound. Open-ended information requirements create the practical likelihood of differing requirements among the states as to what information will be sufficient to evaluate a consistency certification. This unpredictability has a dampening effect on energy projects on the OCS.

In the attached March 25, 2002 letter, we offered language to eliminate the problem caused by 15 CFR 930.58. We suggested (at page 6) that "necessary data and information" be described as:

> (1) a copy of the application for the Federal license or permit and all supporting material provided to the Federal agency in support of the application,
>
> (2) to the extent not included under number 1, a detailed description of the proposed activity, identification of the effects on land or water uses or natural resources of the coastal zone that may foreseeably result from such activity, and identification of the State's enforceable policies related to such activities and their foreseeable effects, and

(3) an analysis of how such activities are consistent with the enforceable policies of the State in light of the foreseeable effects.

We recommend that regulations be proposed that adopt the above language.

II. Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307 (d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.

Delayed decision-making places an unreasonable burden on the applicant, the State, and the federal agencies involved in the CZMA process. We support changes to the regulations that would provide definitive deadlines within which the Secretary of Commerce completes the appeal, thus providing some consistency to the process.

Under the provisions of 16 U.S.C. 1456(c)(3)(A), a federal agency is prohibited from issuing a license or permit unless (1) the State concurs with an applicant's consistency certification; (2) the State is deemed to concur through a failure to act on a consistency determination within six months after receipt; or (3) the Secretary of Commerce finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. Therefore, it is not the function of the Secretary of Commerce, in deciding an appeal, to adjudicate the merits of the underlying activity. In the case of approval of OCS permits and plans, that function remains with the MMS. If the Secretary of Commerce determines that an activity is consistent with the objectives of the CZMA or is in the interest of national security, the MMS may approve the plan, and is still required to complete all of the environmental clearances required by law. The MMS has always supplied the Secretary of Commerce with either copies of Environmental Assessments or a draft EIS when the proposed activity is associated with an OCS permit or OCS plan. The extensive data contained in either an EA or a draft EIS, added to the detailed information submitted by an applicant as part of the contents of an OCS plan, is sufficient information for the Secretary of Commerce to determine whether an activity is consistent with the CZMA or is necessary in the interest of national security.

An appeal before the Secretary will include all of the information that was before the State when it made its objection to consistency. Further, the administrative record will also include all of the environmental and other information available to the MMS used to adjudicate the merits of the underlying permit that is the subject of the appeal. We see no reason why the appeal process should be delayed in order to obtain additional information to add to the administrative record. We therefore suggest that a rule be promulgated that the administrative record will close within 90 days of the filing of the appeal. Because the Secretary of Commerce is only required to determine whether the proposed activity is consistent with the objectives of the CZMA or is in the interest of national security, and is not required to conduct a lengthy or

detailed analysis of the merits of the underlying license or permit, we also suggest that a final determination be issued by the Secretary within nine months from the date of the closing of the administrative record.

III. Whether there is a more effective way to coordinate the completion of federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and the OCSLA.

The MMS always supports the concept of improving coordination and cooperation among the States, applicants, and other federal agencies. We do not agree that the best way to achieve such coordination is through formal rulemaking procedures. MMS's experience has been that factors such as budget, State involvement and expertise, volume of activity, and the like all affect the method by which the needs of the MMS, the State, the applicant, and other federal agencies are met on any given project. The Pacific OCS Regional Office may have agreements with the California Coastal Commission that effectively meet the needs of those two agencies in the review of OCS plans, but those procedures may not work in the Gulf of Mexico. The ability to effectively coordinate among the many interested parties involved in the plan approval process is best achieved by maintaining the freedom and flexibility to enter into agreements and discussions among the parties, and to resolve problems as they occur. We suggest that regulations in this regard may have a dampening effect on the process, and unnecessarily hinder the parties from negotiating specific resolutions to specific problems as they arise.

IV. Whether a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process.

A general negative determination could, in theory, obviate the need to continually revisit long-resolved issues associated with federal activities and result in considerable savings to the agencies and States. Such a regulation must, however, recognize and preserve the fact that the decision on whether a federal activity has any foreseeable coastal effects is made exclusively by the federal agency proposing the activity. We would be happy to work with NOAA to develop regulatory language to implement the concept of general negative determinations. In practice, however, the ability to utilize such a concept may be hampered by the current overly-broad definitions of certain key terms in the existing regulations.

We believe that there are a number of types of "activities" conducted by federal officials that were never intended to be within the purview of the CZMA. At present, the regulations arguably may encompass such purely administrative, ministerial, or "paper" activities only because of the overly-broad definitions of key terms such as "coastal effect", "federal agency activity", and "coastal use or resource" contained in the regulations. The very acknowledgment that there could exist a type or class of activity that would never have coastal effects implicitly

acknowledges the validity of the concerns and objections that DOI has raised before and that are explained in the two attached letters. Changing these regulatory definitions to provide a more common sense approach to the review of Federal agency activities would aid in establishing "general negative determinations." Suggested changes for these definitions are included in the attachments to our comments.

V. *Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic location" descriptions in 15 CFR 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.*

The provisions of the Outer Continental Shelf Lands Act (43 U.S.C. 1340(c)(2) for exploration plans and 43 U.S.C. 1351(d) for development and production plans) prohibit the Secretary of the Interior from granting any license or permit described in detail in a plan where the licensed or permitted activity affects any land use or water use in the coastal zone of a State with a coastal zone management program unless the State concurs in the lessee's consistency determination. Currently, some OCS exploration and development/production activities are being sited hundreds of miles offshore, do not propose onshore support or transportation activities within a State's coastal zone, and have negligible probability for an accidental spill. Such activities therefore have no reasonably foreseeable coastal effects. By law, if the proposed licensed or permitted activities do not affect any land use or water use in the coastal zone of a State, then the consistency provisions of the CZMA do not apply.

Given the myriad activities that may occur far offshore, we see no useful purpose to attempt to develop rules that "assist Federal agencies in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects." Rather, we believe that the Federal agencies responsible for approving permits for such activities possess the most skill and experience to determine the reasonably foreseeable effects of the activities over which they have jurisdiction.

VI. *Whether multiple federal approvals needed for an OCS EP or DPP should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in an EP or DPP, whether other associated approvals, air and water permits not "described in detail" in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP.*

Although we support the idea of increasing efficiency in the review of licenses or permits in the CZMA consistency process, as a practical matter, consolidating reviews may prove impractical for a number of reasons. When a DPP is submitted to the State for consistency review, the clock starts on the statutorily-prescribed time within which the State must act. In order to consolidate the review for all permits, the lessee would have had to have prepared and

submitted its applications for those permits to the appropriate agencies. Those agencies, in turn, must have submitted the applications, along with the consistency certification, simultaneously to the State in order for all time requirements to be consistent. That type of coordination places a greater burden on both the applicant and the agencies issuing the permits. Further, it would not promote efficiency if a problem exists with one permit, and the result is to hold up approval of the DPP or other permits until the problem is resolved. That would simply delay the approval of otherwise meritorious applications. Further, the determinations on the permit applications would have to be severable, in the event that one permit resulted in non-concurrence by the State, while the others were found to be consistent with State programs. It would not be appropriate to withhold consistency on all of the permits or the DPP while the finding of non-concurrence for one permit was appealed to the Secretary of Commerce.

In effect, this proposal is not for a single consolidated consistency review, but for a number of independent reviews occurring simultaneously. We see very little advantage to such a process, given the additional coordination burden that such a process would place on all of the parties.

We appreciate the opportunity to comment on those areas delineated in the ANPR, but believe that major problems that exist with the December, 2000, rulemaking are not being addressed. We look forward to working with NOAA as part of the interagency work groups recently established by Assistant Secretary Watson, Assistant Secretary Manson and VADM Lautenbacher.

Sincerely,

Fred E. Ferguson
Associate Solicitor for Mineral Resources

Attachments (2)
1. Ferguson letter dated January 14, 2002
2. Ferguson letter dated March 25, 2002

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MAR 25 2002

Margaret A. Wilson
Deputy General Counsel
Department of Commerce
14th & Constitution Ave., NW., Ste. 5870
Washington, D.C. 20230

Dear Margaret:

In recent correspondence and conversations you requested that we provide our recommendations for detailed changes to the new CZMA rule. On January 14, 2002, I forwarded to you a detailed explanation of the principal legal problems that we see with the new rule, including conceptual recommendations to solve those problems. Enclosed are the specific suggested language changes that you requested, along with corresponding explanations. We believe that the suggested changes will alleviate some of the problems that we have identified in the CZMA rules.

I appreciate your willingness to work with us to develop rules that are clear, concise, and truly reflect the spirit and meaning of the CZMA. I look forward to continuing to work with you toward that end.

Sincerely,

Fred E. Ferguson
Associate Solicitor for Mineral Resources

PRIVILEGED ATTORNEY WORK PRODUCT
PREPARED IN THE COURSE OF AGENCY
DELIBERATIVE PROCESSES

DEPARTMENT OF THE INTERIOR SUGGESTED CHANGES TO CZMA RULES

The following represents suggested changes to the new rules published on December 8, 2000, by the Office of Ocean and Coastal Resource Management (OCRM) of the National Oceanic and Atmospheric Administration (NOAA) governing the application of the so-called "consistency" provisions of section 307(c) of the Coastal Zone Management Act (CZMA), 16 U.S.C. 1456(c), as amended. *See* 65 FR 77124 (15 C.F.R. part 930 (2001)). An explanation of the principal legal problems with the new rule was sent to the Deputy General Counsel, Department of Commerce, on January 14, 2002. To avoid unnecessary repetition, some of those comments will be incorporated by reference where appropriate. A copy of that document is attached for convenient reference. At the same time, some of the explanations given below summarize or reiterate some of the comments in the January 14 document to avoid the necessity of too-frequent cross-referencing.

I. Overly Broad Definitions and Interpretations of the CZMA in the New Rules

A. Definition of "Federal Agency Activities"

In section 930.31(a), the term "Federal agency activity" is defined in relevant part as follows:

> The term "Federal agency activity" means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. This encompasses a wide range of Federal agency activities which initiate an event or series of events where coastal effects are reasonably foreseeable, *e.g.*, rulemaking, planning, physical alteration, exclusion of uses.

The definition of this term in the predecessor rules contained only the first sentence, and in practice was not taken to its literal extreme. The problems created with the new and expansive definition are discussed at length in the January 14, 2002, explanation at pp. 2-7. For the reasons set forth in that document, we propose to change the definition to read as follows:

> The term "Federal agency activity" means a function performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities. "Federal agency activity" includes lease sales on the Outer Continental Shelf, but does not include ministerial functions, planning, or other administrative tasks that themselves do not have any impact on coastal zone uses or resources without some subsequent intervening activity. "Federal agency activity" does not include rulemaking conducted under the notice-and-comment provisions of 5 U.S.C. 553.

B. Overbroad "Reasonably Foreseeable Effects" Test

At the same time that the new rule greatly expands what constitutes an "activity," it also contains a clearly overbroad definition of what constitutes an "effect" on coastal zone uses or resources. While the CZMA originally required that the effect be a direct result of the federal activity, the new rule relies on language that appeared in the Conference Report for the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) to establish a requirement that direct, indirect or cumulative effects could give rise to CZMA review of a particular activity. Although the "directness" of the effect may have changed, the requirement in the CZMA that the activity being scrutinized must cause the effect has never changed.

However, the new rule, in substance, tries to make the Conference Report language stand for the proposition that if an activity (which in and of itself could not possibly have an effect) could conceivably give rise to future activities that may eventually have an effect on the coastal zone, then the first activity is subject to consistency review. Such an interpretation is nowhere to be found in the CZMA, and is contrary to the notion set forth by Congress that cumulative and redundant reviews are not intended by the CZMA process. However, it is this interpretation, coupled with the broad definition of "activity," that results in injecting the CZMA process into the deliberative process and purely "paper" activities of federal managers. *See* January 14, 2002 analysis at 7.

The "reasonably foreseeable effects" test as embodied in the preamble to the December 2000 rules (65 FR 77124, 77130, 77132, 77156) is not specifically embodied in the text of the new regulations. Adopting the suggested revised definition of "Federal agency activity" described in part I (A) above should provide the proper context for the "reasonably foreseeable effects" test. The preamble discussion should then be changed to reflect consistency with the definition of "Federal agency activity".

C. Definition of "Coastal Use or Resource"

The definition of "any coastal use or resource" in 15 C.F.R. 930.11(b) includes almost anything imaginable, including "scenic" and "aesthetic enjoyment" values that are utterly subjective and simply cannot be measured. We believe this definition to be unworkably broad and not a reasonable implementation of the CZMA. Because the CZMA already lists definitions of "land use" and "water use" in sections 304(10) and 304(18) of the Act (16 U.S.C. 1453(10) and (18)), we see no reason to expand upon those definitions in the regulations. Further, Congress has provided a workable definition of the term "natural resource" in the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) that is readily adaptable to the CZMA. Accordingly, we suggest the following language change to the regulations at 15 C.F.R. 930.11(b):

> (b) *any coastal use or resource.* The phrase 'any coastal use or resource" means any land or water use or natural resource of the coastal zone. Land and water uses are defined in sections 304(10) and (18) of the act, respectively. "Natural resources" means land,

fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources found within a State's coastal zone on a regular or cyclical basis.

D. Definition of "Consistent to the Maximum Extent Practicable" and Related Provisions

Our concerns with this definition are set forth in Part I (D) of the January 14, 2002, analysis. Accordingly, we suggest the following change to the definition at 15 C.F.R. 930.32(a)(1):

> (a)(1) The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of State management programs unless a determination is made by the federal agency that such full consistency is not practicable due, but not limited to, such factors as logistical impediments, lack of adequate technology, illegality, time and space considerations, conflicts with other statutory authority, cost effectiveness, availability of equipment or other non-monetary resources, preservation or conservation of natural resources, and issues relating to health and safety.

Paragraphs (a)(2), (a)(3) should be deleted. Paragraphs (b) and (c) would remain as they are in the current text.

The suggested changes to section 930.32(a)(1) necessitate corresponding changes to other provisions that are based on the current section 930.32(a)(1). Specifically, section 930.39(a), "Content of a consistency determination," needs to be revised to reflect the suggested change in the definition. Accordingly, we recommend revising section 930.39(a) as follows:

> (a) The consistency determination shall include a description of the proposed federal activity, a description of the foreseeable impacts that such activity may cause, and identification of the relevant enforceable policies of State management programs. The consistency determination shall also contain a statement indicating whether the proposed federal activity will be undertaken in a manner consistent to the maximum extent practicable with the identified enforceable policies. If the federal agency determines that its activity is not fully consistent with the enforceable policies of State management programs, the consistency determination shall also contain an analysis explaining why full consistency or greater consistency with those enforceable policies is not practicable, and must state whether the impediment to consistency is temporary or permanent in nature.

Paragraphs (b) through (e) would remain as they are in the current text.

E. Definition of Federal license or permit

The definition of "federal license or permit" at section 930.51(a), as written, creates ambiguity and is open to misinterpretation, for at least two reasons. First, the definition is written so broadly as to include the term "certification," which may encompass all sorts of purely ministerial paperwork that does not grant any authorization to anyone to do something that otherwise would be impermissible. In its ordinary English usage, the term "certification" does not denote or connote permission or authorization to undertake an activity that otherwise could not lawfully occur. Second, the first sentence of the definition does not include any object for the terms "authorization," approval," or "permission." In other words, the definition does not answer this question: "For what is the authorization, approval, or permission being given?" Accordingly, we suggest revising the first sentence of section 930.51(a) to read as follows to more accurately reflect the nature of the license or permit that the CZMA contemplates:

> (a) The term "federal license or permit" means any required authorization, approval, lease, or other form of permission that any Federal agency is authorized to issue to an applicant that an applicant is required by law to obtain before the applicant commits resources to conduct or conducts physical activities affecting land or water uses or natural resources of the coastal zone. [The remainder of this paragraph is the same as the current text.]

II. Conditional Concurrences

The provisions of 15 U.S.C. 930.4 introduce the new concept of "conditional concurrences" to the CZMA consistency process. This issue was discussed extensively in the January 14, 2002, analysis at pp. 10-12. For the reasons set forth and analyzed there, we suggest that this section be deleted from the regulations.

III. Offshore Lease Suspensions

This issue has been the topic of extended discussions between NOAA, DOI, and the Justice Department, particularly in the context of the State of California's lawsuit challenging MMS' grant of suspensions of 36 undeveloped leases offshore of the State. *California v. Norton,* Nos. 01-16637 and 07-16690 (9th Cir.). NOAA affirmatively asserts in the preamble that a suspension is a "federal license or permit" within the meaning of CZMA section 307(c)(3)(A) and the NOAA rules. 65 FR 77144.

The DOI's objections to this conclusion have been explained in detail in the letter from the Solicitor to the NOAA Acting General Counsel dated December 8, 1999, and in Part III of the January 14, 2002 analysis (pp. 12-13) that incorporates it. To our knowledge, NOAA has not advanced any persuasive reasons that demonstrate that the explanations given in these documents are incorrect or inaccurate. Further, in the meetings a few months ago preliminary to filing the

United States' principal brief as appellant in *California v. Norton*, both the Solicitor General's office and the Environment and Natural Resources Division at the Justice Department disagreed with the view that an offshore lease suspension constitutes a "federal license or permit." Accordingly, we suggest modifying the second sentence of section 930.51(a) to read as follows:

> The term does not include OCS plans, federal license or permit activities described in detail in OCS plans (which are subject to subpart E of this part), or suspensions of federal oil and gas or other mineral leases on the outer continental shelf. [The remainder of this paragraph would read as currently written.]

IV. Statutory Review Period

A. Commencement of State Review Period

Under the CZMA (section 307(c)(3)(A) and (B)), a state must concur with or object to a consistency certification regarding a proposed activity requiring a federal license or permit or an OCS exploration or development plan within six months, or the state is deemed to concur. Under the former rules, that time period began when the information was received by the state for review. Under the new regulations, two critical elements have been added to the process. First, section 930.58 of the new regulations adds a plethora of information that must accompany a consistency certification, above and beyond that which is required by the Minerals Management Service (MMS) or other federal licensing agency. Second, section 930.60(a)(1) provides that the time period for review does not start until the state receives all of the information contained in section 930.58. Sections 930.76(b) (which refers to section 930.58) and 930.77 impose the same requirements for OCS exploration and development plans.

Under the current rule, the state becomes the arbiter of what constitutes sufficiency of the data submitted. While the state has 30 days within which to notify the applicant and the federal agency of the deficiency, there is no limit on the number of times that the state can claim a deficiency of the data submitted. In effect, the state can delay the start of the review period indefinitely simply by continuing to argue that it need more data.

The new rules create a similar problem with respect to federal agency activities and federal consistency determinations. Under section 930.41, the 60-day review period allowed for state review of federal activities begins when the state agency receives the consistency determination and supporting information required by section 930.39(a). That section sets forth general requirements for information that the federal agency must be submit, and is extremely general and ambiguous. The adequacy of the submission is entirely subject to state interpretation. Although the state is required to notify the agency immediately if the filing is incomplete or otherwise insufficient, there is no limitation on how many times the state can delay the start of the review period simply by claiming that it needs further data or information and the filing is incomplete. If a state wishes to hold up a federal agency activity or project for political or philosophical reasons, even though the

proposed activity is consistent with the enforceable policies of the state's management program, the state effectively may avoid the consistency issue altogether for some period of time simply by demanding additional data.

In order to alleviate the problems that the new rule presents, we suggest the following sections be amended to read as follows:

930.58 Necessary data and information

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) a copy of the application for the federal license or permit and all supporting material provided to the Federal agency in support of the application for the license or permit.

(2) to the extent not included in (1) above, a detailed description of the proposed activity, identification of the effects on land or water uses or natural resources of the coastal zone that may foreseeably result from such activity, and identification of the enforceable policies of the state that relate to such activities and their foreseeable effects.

(3) an analysis of how such activities are consistent with the enforceable policies of the state in light of the foreseeable effects.

[Paragraphs (b) and (c) would remain as currently written.

930.60 Commencement of State agency review.

(a) [same as current text]

(1) [same as current text, except change the 30-day notification period to 15 days]

(i) The State agency's review has not yet begun, and that its review will commence upon receipt of the missing certification or information; or

(ii) The State agency's review has begun, and that the missing certification or information must be received by the State during the State's review period.

(2) Under paragraph (a)(1) of this section, State agencies shall notify the applicant and the Federal agency within 15 days of receipt of the missing certification or information, and that the State agency's consistency review began on the day that the State agency received such information.

The new 15 C.F.R. 930.60(a)(3) purports to allow the State and a permit applicant to mutually agree to stop the statutory 6-month review period. The period is prescribed by law and cannot be waived by agreement of the parties. We therefore recommend that this provision be deleted. Paragraph (b) of section 930.60 would remain as currently written.

V. Assumption of Authority by NOAA Regarding Exploration Plans and Development and Production Plans

Section 930.76 relates to the submission of an OCS plan, necessary data and information, and consistency certifications. On its face, the regulation is unclear whether the information is required as part of the OCS plan, or is an independent filing. Considering the submissions to be part of the OCS plan is problematic because it is the Secretary of the Interior, through her authority under OCSLA, who is authorized to determine the filing requirements for OCS plans. The proposed changes to section 930.58 alleviate some of our concerns. However, we believe that this section should be revised to clarify this issue. We therefore suggest that section 930.76be amended to read as follows:

Any person submitting an OCS plan to the Secretary of the Interior or designee shall:

(a) Identify all activities described in detail in the plan that require a federal license or permit and that will have reasonably foreseeable effects on any land or water use or natural resource of the coastal zone;

(b) Provide the Secretary of the Interior or designee with a consistency certification and the information required under section 930.58(a)(2) and (3). The Secretary of the Interior or designee will furnish the State agency with a copy of the OCS plan (excluding proprietary information) and the information required by this section.

(c) [same as current part (d)]

VI. Deference to State in Determining "Substantially Different Coastal Effects"

The new 15 C.F.R. 930.51(b)(3) provides that a renewal or major amendment of activities requiring a federal license or permit that a state agency previously reviewed must go through

consistency review if it "will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency." A similar concept is incorporated into the definition of "major amendment" in section 930.51(c). Section 930.51(e) provides that the determination of "substantially different coastal effects" is made on a case-by-case basis by the State agency, Federal agency and applicant, but the section then provides that "[t]he opinion of the State agency shall be accorded deference" in determining whether there are substantially different coastal effects.

This provision creates an avenue for states that are opposed to a particular activity, or that undergo changes in philosophy or policy as a result of political changes, to demand consistency review under circumstances where it is clear that there will be no substantially different effects from any renewal or amendment of that activity. This undermines the stability of legitimate federal programs and the security that federal licensees have with respect to the rights that they enjoy under their licenses and permits. Accordingly, we suggest that section 930.51(e) be modified as to read follows:

> (e) The determination of substantially different coastal effects under paragraphs (b)(3) and (c) of this section is made on a case-by-case by the Federal agency in consultation with the State agency and the applicant.

VII. State Agreement that Insignificant Effects are Insignificant

The *de minimis* provision in section 930.33(a)(3) requires that the state agree that an activity is *de minimis*. A state veto over a *de minimis* provision makes it unreliable in practice, and does not facilitate practical implementations of the statute. Congress presumably was not interested in Federal agencies or states expending substantial resources on insignificant issues, but the structure of the *de minimis* provision creates an express avenue for a state to compel wasteful expense. We therefore suggest that section 930.33(a)(3)(i) be modified to read as follows:

> (3)(i) *De minimis* Federal agency activities. Federal agencies are encouraged to review their activities, other than development projects within the coastal zone, to identify *de minimis* activities that will not be subject to further State agency review. The Federal agency shall consult with State agencies when making a determination that a particular activity is *de minimis*.
>
> (ii) *De minimis* activities are activities that are expected to have insignificant direct or indirect (cumulative and secondary) coastal effects, as determined by the Federal agency in consultation with the State agency.

VIII. "Failure to Comply Substantially with an Approved OCS Plan"

Section 930.85(c) provides that, in cases of operators failing to comply with approved OCS exploration or development plans, the amended OCS plan must be submitted simultaneously to the State and the MMS. When a plan is submitted to the MMS for approval, the MMS reviews that plan for completeness, adequacy, and to ensure that it meets the requirements of the OCSLA. It makes little sense to submit the plan to the State before the MMS has the opportunity to review it and require any changes or amendments that may be necessary. We therefore recommend that section 930.85(c) be amended to delete the phrase "and to the State agency" from the second sentence of the section.

IX. "Consistent with the Objectives or Purposes of the Act"

Section 930.121 defines the term "consistent with the objectives or purposes of the Act" in connection with appeals to the Secretary of Commerce from State agency objections to consistency certifications by applicants for Federal licenses and permits and lessees who submit OCS exploration or development plans. One of the statutory grounds on which the Secretary of Commerce may overrule a state objection to a consistency certification is a finding that the proposed activity (or each activity described in an OCS plan) is "consistent with the objectives of this chapter [the CZMA]." CZMA section 307(c)(3)(A) and (c)(3)(B)(iii). The corresponding term in the rule is "consistent with the objectives or purposes of the Act." Section 930.121(c) currently prescribes, as one of three requirements for an activity to be "consistent with the objectives and purposes of the Act," the following:

> (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.

In considering the availability of reasonable alternatives to the proposed activity, the Secretary of Commerce's greatest resource would likely be the experts of the Federal agency responsible for the administration of the activity itself. Yet the regulations do not provide a vehicle by which those experts could examine potential alternatives and make their views known. We therefore suggest that the following sentence be added to the end of section 930.121(c):

> The Secretary shall consult with the Federal agency responsible for administering the program under which the particular permit or license is issued in order to obtain the Federal agency's views with regard to the availability or reasonableness of any alternatives considered by the Secretary pursuant to this section.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

14 January 2002

Margaret A. Wilson
Deputy General Counsel
Department of Commerce
14th & Constitution Ave., N.W., Ste. 5870
Washington, D.C. 20230

Dear Margaret:

Thank you for your request that we provide our recommendation for detailed changes to the new CZMA rule. Enclosed is a one-page summary and a more complete explanation of the principal legal problems we see with the new rule, including conceptual recommendations to solve each problem. We have not recommended specific language (except where we propose simply removing a provision), because working out specific language will take considerable effort and extensive consultation between NOAA personnel and its counsel and MMS and our office.

In that regard, we understand that Secretary Norton and Secretary Evans agreed recently to establish a working group for the purpose of reexamining and revising the regulations. We are prepared to begin work, as is the MMS. I think we should talk right away about who should participate in that effort from our side.

Thanks again for your help in a very difficult matter. look forward to continuing to work together.

Sincerely,

Fred E. Ferguson

Fred E. Ferguson
Associate Solicitor for Mineral Resources

PRIVILEGED ATTORNEY WORK PRODUCT PREPARED IN THE COURSE OF AGENCY DELIBERATIVE PROCESSES

14 January 2002

Problem Issue Outline/Summary

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B. Overbroad "Reasonably Foreseeable Effects" Test (65 FR 77124, 77130, 77132, 77156)

C. Definition of "Coastal Use or Resource" (15 C.F.R. 930.11(b))

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II.. Conditional Concurrences (15 C.F.R. 930.4)

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IV. Statutory Review Period

A. Commencement of State Review Period (15 C.F.R. 930.39(a), 930.41, 930.58, 930.60(a)(1), 930.76(b), 930.77)

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VI. Deference to State in Determining "Substantially Different Coastal Effects" (15 C.F.R. 930.51 (b)(3), (c), and (e))

VII. State Agreement that Insignificant Effects are Insignificant (15 C.F.R. 930.33(a)(3))

PRIVILEGED ATTORNEY WORK PRODUCT PREPARED IN THE COURSE OF AGENCY DELIBERATIVE PROCESSES

14 January 2002

On December 8, 2000, the Office of Ocean and Coastal Resource Management ("OCRM") of the National Oceanic and Atmospheric Administration ("NOAA") published new regulations governing application of the so-called "consistency" provisions of section 307(c) of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. 1456(c), as amended *See* 65 FR 77124 (15 C.F.R. part 930 (2001)).

Section 307(c) of the CZMA, as amended, addresses two types of activities that "affect[] any land or water use or natural resource of the coastal zone." The first category is federal agency activities. The second category is private activities that require a federal license or permit.

With respect to federal agency activities, CZMA section 307(c)(1), as amended, requires a federal agency to carry out its activity in a manner that is "consistent to the maximum extent practicable" with the "enforceable policies" of the state's coastal management program. (The coastal management program must be approved by the Department of Commerce.) The federal agency must provide a "consistency determination" to the state for an activity that affects a land or water use or natural resource of the coastal zone not later than 90 days before final approval of the activity. In addition, the NOAA rule (at 15 C.F.R. 930.35) requires that under any of four identified types of circumstances, the agency must provide to a state a "negative determination" (*i.e.* a determination that there are no coastal effects) for proposed activities, even though the Federal agency has concluded that there will be no effects, at least 90 days before final approval of the activity.

With respect to private activities that require a federal license or permit, CZMA section 307(c)(3)(A) requires an applicant for a required federal license or permit to certify that the proposed activity complies with the enforceable policies of the state's approved coastal management program. The state then has a period of time to concur with this "consistency certification" or to object to it. If the state objects, the relevant federal agency may not issue a license or permit. The applicant for the permit may appeal the state's objection to the Secretary of Commerce. If the Secretary of Commerce overrules the state's objection to the consistency certification, the federal agency may then issue the license or permit.

CZMA section 307(c)(3)(B) contains an important exception to subparagraph (A). Activities under oil and gas leases on the Outer Continental Shelf ("OCS") are conducted under detailed plans for exploration or development that must be approved by the Minerals Management Service ("MMS"). The Outer Continental Shelf Lands Act ("OCSLA") specifically requires that those plans go through consistency review before final approval of a plan. CZMA section 307(c)(3)(B) provides that the requirement to provide a consistency certification, and the procedures for state concurrence or objection and appeal to the Secretary of Commerce before the agency may issue a license or permit, do not apply to activities on the OCS that are described in an MMS-approved exploration or development plan if the state has already concurred in the consistency certification for the

exploration or development plan itself. This provision was enacted to avoid multiple duplicate consistency review proceedings.

For both categories of activities — federal agency activities and private activities requiring a federal license or permit — the activity may occur either in or outside of the coastal zone, but the activity is covered if it "affects" a "land or water use or natural resource" of the coastal zone. The OCS is outside of the coastal zone.

Nowhere in the CZMA does the Congress declare an intent to amend, either expressly or by implication, the myriad of underlying substantive statutes that serve as the basis of authority for federal agencies to conduct activities that "affect" the coastal zone. That is not to say that the states do not play a legitimate role or lack significant input into federal activities affecting the coastal zone. In the context of offshore oil and gas leasing, the OCSLA and the rules implementing the Act set forth the stages and activities that trigger CZMA consistency, and provide for consultation with the states as the leasing process progresses. The specific provisions of the OCSLA and the CZMA fit together precisely, and the relationship between the two statutes is expressly delineated. It has never been the purpose of the CZMA to authorize states to "second guess" federal decision makers when they carry out their responsibilities. In the case of federal oil and gas development, opportunities for the states to be heard and the requirement that activities on an OCS lease be conducted in a manner consistent with the enforceable policies of a state's coastal management program are provided specifically by OCSLA at various stages of the oil and gas leasing, exploration, and development process.

In promulgating the new regulations, it appears that NOAA went beyond the statutory scope of the CZMA consistency process. In many cases, the overly broad definitions given to key terms and phrases in the CZMA result in conflicts with other statutes such as the OCSLA, and give rise to issues of potentially unlawful transfer of authority of the Secretary of the Interior to the states. The new rules create multiple layers of consistency review and in some cases make little sense within the context of the CZMA itself, as explained below.

I. Overly Broad Definitions and Interpretations of the CZMA in the New Rules

A. Definition of Federal Agency "Activities"

1. Planning

The new NOAA rule attempts to make agency rulemaking, regulation and planning subject to CZMA consistency requirements under subpart C, which applies to federal agency activities under CZMA section 307(c)(1). 15 C.F.R. 930.31(a) and preamble at 65 FR 77131-77133. In section 930.31(a), NOAA defines the term "Federal agency activity" in relevant part as

> The term "Federal agency activity" means any functions performed by or on behalf of a Federal agency in the exercise of its statutory

> responsibilities. This encompasses a wide range of Federal agency activities which initiate an event or series of events where coastal effects are reasonably foreseeable, *e.g.*, rulemaking, planning, physical alteration, exclusion of uses.

The definition of this term in the predecessor rules contained only the first sentence. While the old rule defined "Federal agency activity" as "any functions" performed by an agency in the exercise of its statutory responsibilities, in practice it was not taken or applied quite so literally. Executive branch agencies by definition are creatures of statute, and everything an agency does is done within the context of some authorizing legislative authority. In practice, however, NOAA attached a more common-sense meaning to the term "function" that was consistent with the concept of an "activity."

The additions to the definition of "Federal agency activity" in the new rules greatly expand the intended reach of this provision. It is now difficult to envision anything that an agency, or its officers and personnel, might do that would not fall within this definition. For example, "planning" is not defined. Nowhere does the rule or the preamble explain what is, or is not, "planning." Formal and informal meetings appear to fall within the scope of "planning." Such meetings are, in any event, "functions" performed by agency personnel in the agency's "exercise of its statutory responsibilities," if that phrase is now to be interpreted much more literally. The new definition is so open-ended as to create many times more problems than it could solve.

Under the new rule, it appears that "activities" that are purely academic or "paper" in nature, such as the "planning" specifically mentioned, that could not possibly have any actual impact on the coastal zone without some later intervening activity (which in most cases would be reviewable under the CZMA), are now subject to CZMA review. At best, this creates duplicative CZMA review proceedings. At worst, an agency's internal processes may be administratively paralyzed.

As a specific example, the new rule's definition creates serious difficulty with OCSLA processes that Congress has never indicated were within the CZMA's coverage. The OCSLA, at 43 U.S.C. 1344(a), requires the Secretary of the Interior to prepare and periodically revise a schedule of proposed oil and gas lease sales. The MMS conducts these activities on behalf of the Secretary. These efforts result in the preparation of the 5-Year Leasing Program (Program). The Program is purely a planning document, and is the product of a long multi-phase process (that includes obtaining comments from coastal states). It is not a decision to take any action, commit any resource, convey any interest in subsurface minerals, or authorize any party to conduct any physical activity that may affect a land or water use or natural resource of the coastal zone. The preparation of the 5-year Leasing Program is fundamentally a paper exercise, yet under the proposed definition of "Federal agency activity," would be subject to the CZMA consistency review process. Indeed, in the preamble to the new rule (though not in the text of the rule itself), NOAA specifically asserts that MMS' 5-year Program is now subject to consistency review. However, there is nothing which limits the reach of the rule to planning as formal as the OCS 5-year Program. DOI and other agencies engage in a wide range of "planning" exercises. Where is the line?

The argument that OCRM repeatedly has emphasized is a statement in the House Report for the 1990 CZMA reauthorization amendments that no federal agency actions that will affect natural resources, land uses, or water uses in the coastal zone are "categorically exempt" from CZMA consistency determination requirements. H.R. Conf. Rep. No. 964, 101st Cong. 2d Sess. 970. On this basis, OCRM has taken the position that they apply to virtually any activity of any agency, as broadly defined above (and has defined the "effects test" accordingly, as discussed below). Contrary to OCRM's sweeping view, the absence of a "categorical exemption" in the statute does not resolve the issue. The term "exemption" implies that the activity being excluded or exempted was subject to CZMA requirements in the first instance. If this was not the case, there would be no need for an exemption. Even the language of the House Report upon which the OCRM relies still contemplates a nexus between the "activity" and an actual effect on coastal zone uses or natural resources.

The purpose of the consistency provisions of the CZMA is to ensure that when a Federal agency actually does something that in fact will result in affects a land or water use or the natural resources of the coastal zone, it must do what it does in a manner consistent with the enforceable policies of state coastal management programs as far as practicable. There are, necessarily and unavoidably, agency "activities" that are not subject to CZMA consistency requirements or procedures because the very nature of the "activity" is such that it would never have an effect on land or water uses or natural resources of the coastal zone. Consequently, such activities do not meet CZMA section 307(c)(1)'s threshold requirement for coverage. NOAA's rules do not seem to contemplate that possibility.

Further, neither the language nor the legislative history of the 1990 amendments indicates that the CZMA covers any "function" that theoretically could be regarded as the first step in a process that later leads to activities that actually do, or foreseeably will, affect land or water uses or natural resources of the coastal zone, when such activities are undertaken only after other intervening decisions are made at a later time. Almost anything could "initiate an event or series of events" that "foreseeably" leads to coastal effects. The definition in the new rule invites law-school-type intellectual gymnastics about causation. The only possible result is multiple, duplicative, and ultimately wasteful consistency determinations — and the premature disputes that will arise in some cases — that serve no discernible purpose.

The preparation of MMS' 5-year Program is a good example of the problem. The 5-year Program is, in effect, a paper outline of what MMS may do if other decisions are made later to proceed with leasing and subsequent exploration and development. Those later activities — lease sales, activities under exploration plans, and activities under development and production plans — are all subject to CZMA consistency review. At the 5-year Program planning stage, any "effects" from subsequent phases of the process are, at best, purely speculative. For example, MMS may include a frontier area offshore of Alaska for potential leasing under the 5-year Program. But MMS may decide not to hold a lease sale in that area, and it would be a tremendous waste of both Federal and State resources to examine the possible impacts of such leasing if it may not even occur. The very nature of the 5-year program is such that it does not affect land or water uses or natural

resources of the coastal zone. and the 5-year program has never been subject to consistency review under the CZMA.[1]

Furthermore, the OCSLA is the one federal statute in which Congress directly addressed the issue of the applicability of the consistency provisions of the CZMA to the distinct steps in offshore oil and gas leasing and development process. In 1976, in enacting major amendments to the CZMA (Pub. L. No. 94-370), Congress rewrote the consistency provision to include a specific section (section 307(C)(3)(B)) on OCS exploration plans and development and production plans. The 1978 amendments to the OCSLA (Pub. L. No. 95-372) Congress integrated the procedures stipulated in section 307(C)(3)(B) of the CZMA into the exploration plan (43 U.S.C. 1340) and development and production plan (43 U.S.C. 1351) sections of the OCSLA. The 1978 amendments laid out a sequential series of steps and procedures that begin with the development of the 5-year Program and proceed through the lease sale, the exploration plan, and the development and production plan.

When Congress wanted to stipulate the relationship between the CZMA and the OCS program, it did so with specificity. In particular, in directing the Secretary to develop the 5-year Program in OCSLA section 18 (43 U.S.C. 1344), Congress requires that the Secretary establish procedures for, *inter alia*, ". . .consideration of the coastal zone management programs being developed or administered by an affected coastal State. . . ." 43 U.S.C. 1334(f)(5) (emphasis added). Congress did not call for procedures for the consistency of the 5-year Program with state coastal management programs under the CZMA. The choice of words in the statute is telling, because Congress obviously knew how to spell out the relationship between the federal consistency provision

[1] It is particularly noteworthy that the OCSLA provisions under which the 5-year Program is prepared provide for extensive state participation in the process. In developing the Program, the Secretary must consider the laws, goals, and policies of affected states which have been specifically identified by the Governors of such States as relevant matters for the Secretary's consideration. 43 U.S.C. 1344(a)(2)(F). The Secretary also must solicit suggestions from affected state and local governments, and submit the proposed program to governors of affected states for review. 43 U.S.C. 1344(c). In light of these requirements, it is readily apparent that trying to impose consistency review at this early stage serves no statutory purpose. Nor did Congress contemplate, in either the CZMA or the OCSLA, that the Secretary of the Interior should have to engage in fundamentally redundant processes.

of the CZMA and different parts of the OCS program.[2] The new NOAA regulations conflict with the process that Congress prescribed in these statutes.

2. Rulemaking

Saying that a "rulemaking" is an activity covered under CZMA Section 307(c)(1) makes no more sense than asserting that it covers "planning." Even if the term "rulemaking" were interpreted to be limited to issuance of a final rule (and to not include proposed rules and other phases of the process), NOAA's new position raises serious administrative law concerns. In essence, NOAA would require that a Federal agency send a consistency determination for a final rule to one or more (often many) states after notice and comment proceedings are already concluded and the content of the final rule determined. The agency then would have to wait at least 90 days to actually publish the final rule in the *Federal Register*.

If any one state objected to the consistency determination, the new rule requires the agency to make one of the findings described in 15 C.F.R. 930.43(d) before it could publish the final rule. The state also could request "mediation" through the Secretary of Commerce or NOAA under 15 C.F.R. 930.44 — which, presumably, would prevent the agency from publishing the final rule until the "mediation" was concluded. But the states that had objections to the rule when it was proposed presumably would have participated in the process and submitted comments explaining the state's concerns. NOAA's interpretation effectively gives one group of commentors a "second bite at the apple." It also gives a state that does not like a rule the practical ability to hold up rulemaking proceedings for extended periods. Further, neither the Secretary of Commerce nor NOAA has authority as a "mediator" to prescribe the content of another agency's regulations, or to compel another agency to change a contemplated final rule in a way that NOAA believes might be convenient to resolve the "mediation," or to delay publication of a final rule. Moreover, the proceedings of any "mediation" potentially create serious problems with the content of the rulemaking record and with communications from one or more outside parties after the close of the comment period.

For all of these reasons, the position taken in the new rule appears to conflict with the Administrative Procedure Act's notice-and-comment procedures at 5 U.S.C. 553. Moreover, nothing

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[2] Congress initially was silent on the applicability of the consistency provisions to the next step in the OCSLA process after the 5-year Program, namely OCS lease sales. In *Secretary of the Interior v. California*, 464 U.S. 312 (1984), the Supreme Court held that lease sales were not activities which "directly affect" the coastal zone within the meaning of section 307(c)(1) of the CZMA as it then read. Six years later, Congress passed the Coastal Zone Act Reauthorization Amendments of 1990 (Pub. L. No. 101-508) ("CZARA"). The legislative history of CZARA makes it clear that Congress intended to overturn the Supreme Court's decision and make OCS lease sales subject to the CZMA's consistency provisions. Neither the statutory language nor the legislative history of the 1990 amendments stated or implied any change in the non-applicability of consistency review to the 5-year Program.

in the text or legislative history of the CZMA or its amendments remotely hints at any congressional intent to bring agency rulemaking within the ambit of the CZMA.

Recommendation: Remove the references to planning and rulemaking from the definition of "Federal agency activities." If the definition continues to use the term "function," describe what constitutes a function in a more practical and common-sense way.

B. Overbroad "Reasonably Foreseeable Effects" Test

At the same time the new rule greatly expands what constitutes an "activity," it also contains a clearly overbroad definition of what constitutes an "effect" on the coastal zone. While the CZMA originally required that the effect be a direct result of the federal activity, NOAA now relies on language that appeared in the Conference Report for the CZARA to establish a requirement that direct, indirect or cumulative effects could give rise to CZMA review of a particular activity. Although the breadth and foreseeability of the effect may have changed, the requirement in the CZMA that the activity being scrutinized must cause the effect has never changed. NOAA appears to have lost sight of this crucial statutory nexus.

The new rule, in substance, tries to make the Conference Report language stand for the proposition that if an activity (which in and of itself could not possibly have an effect) could conceivably give rise to another activity, which could trigger another activity that may eventually have an effect, then the first activity is subject to consistency, notwithstanding the fact that the subsequent activities that *actually* cause the effect are also subject to consistency review. In effect, NOAA has developed what amounts to a "theoretically-possible-later-effects-from-further-activities" test. (65 FR 77124, 77130, 77132, 77156). Such a requirement is nowhere to be found in the CZMA.

However, it is through this interpretation (in addition to the broad definition of "activity") that NOAA finds its way to inject the CZMA process into the deliberative processes and purely paper activities of federal managers. The ramifications of this overly broad interpretation are very serious.

Hypothetically, MMS may consider amending rules that might indirectly affect the level of oil or gas production on the OCS. For example, deep water lease royalty relief, royalty rate reductions, royalty valuation changes, or transportation allowance amendments may "foreseeably" result in an increase in production. From there, it is arguably "foreseeable" — in the sense of theoretically possible — that the increased production could result in an indirect change in a "land use" in the coastal zone (for example, more production may go through a gas processing plant, or more oil might be refined, than before). According to NOAA, the rule, which does nothing more than affect the royalties paid to the United States, would be subject to consistency determination requirements, even though any actual effect on the coastal zone is at best theoretical and speculative.

Indeed, even if a producer had to increase gas processing plant or refinery capacity at a facility within the coastal zone, any relevant enforceable policies of the state's coastal management program would come into play at the point that the producer sought the relevant state or local permits to expand the facility. And that is where they should come into the picture — not in the context of a royalty valuation rule. Further, if any Federal permit were necessary to expand the plant or refinery capacity, the producer would have to provide a consistency certification (that the expansion of the plant or refinery is consistent with the enforceable policies of the state's coastal management program) at the time it applied for the permit.

Moreover, there is nothing in NOAA's rules that would prevent NOAA (or a state) from asserting that the policy meetings and the drafting of the rule constitute "activities" under the CZMA that "foreseeably" may lead to an effect on the coastal zone under NOAA's view of the concept, thus requiring state CZMA scrutiny. Although this is an absurd result, there is technically nothing to prevent such an interpretation, given the unreasonably broad definitions contained in the new rule.

There are numerous other examples where NOAA's interpretation leads to equally absurd results. In some cases, NOAA's interpretation may give rise to serious constitutional implications regarding unlawful delegation of executive power. But in any event, NOAA's view is clearly outside the scope of any reasonable interpretation of the CZMA.

Recommendation: Revise the concept of "foreseeable" effects to encompass actual effects that are likely to result from the specific activity at issue. The concept of "foreseeability" should not include effects that are merely speculative or theoretically possible. Nor should it include effects that would or might result from other subsequent activities or other activities that require intervening decisions.

C. Definition of "Coastal Use or Resource"

The definition of "any coastal use or resource" in 15 C.F.R. 930.11(b) includes almost anything imaginable to the creative mind, including aesthetic or scenic values that simply cannot be measured. This is unlawfully broad and not a reasonable implementation of the CZMA. This goes hand-in-hand with the expansion of "effects" to assert almost unlimited coverage.

Recommendation: Revise the definition of "coastal use or resource" to reflect real uses of land and water areas within the coastal zone, as contemplated in the statutory definitions of "land use" and "water use" in CZMA section 304(10) and (18), respectively (16 U.S.C. 1453(10) and (18)), and to reflect a common understanding of the term "natural resources."

D. Definition of Consistent "to the Maximum Extent Practicable"

Title 15 C.F.R. 930.32(a)(1) defines the statutory term "consistent to the maximum extent practicable" as "fully consistent with the enforceable policies of management programs unless full

consistency is prohibited by existing law applicable to the Federal agency." (Emphasis added.) This definition does not reflect the clear language or intent of the CZMA.

Section 307(c)(1)(A) of the CZMA requires that "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs." If it were the intent of Congress to require absolute and complete consistency with the enforceable policies of the state program, with the only exception being illegality, it could have said so. Instead, Congress established the requirement that consistency is required to "the maximum extent practicable." This is a much broader standard than that contained in the regulatory definition, and clearly allows for an objective consideration of the facts and circumstances surrounding the proposed activity compared to the requirements of the enforceable policies of the state. The definition in the NOAA regulations allows absolutely no analysis of the proposed activity or the circumstances surrounding its implementation.

It is true that the predecessor rules contained the same definition. However, given the other extremely broad definitions in the new regulations, this definition takes on greater significance and becomes more problematic than in the past. In any event, it is not too late to reexamine the relationship of the regulatory definition to the statutory language.

In order for an activity to be "practicable," it must at least be possible or capable of being done. While a legal prohibition against complying with some policy of a state management program, as the definition contemplates, is certainly an impediment to achieving full consistency, there may be many more legitimate reasons why full compliance with the enforceable policies of the state is not possible or feasible. Depending upon the activity and the circumstances surrounding its implementation, compliance may be impeded by logistical problems, lack of adequate technology, time and space considerations, conflict with other statutory authority (including OCSLA), cost effectiveness (as opposed to availability of funds), availability of equipment and other non-monetary resources, as well as a need to balance full compliance with other factors such as preservation of resources, etc. The current definition is so narrow as to preclude a factual analysis. We may look only to whether full compliance is legally prohibited, and if it is not, then full compliance is required, even if it is not possible or feasible for other reasons. In NOAA's view, any other reason is irrelevant.

The result of this rigid standard is predictable if a situation arises in which a state has set an "enforceable policy" that conflicts with a federal agency program or objective. Under NOAA's definition, the state simply trumps the federal agency unless the agency is legally prohibited from complying with the state policy. We do not believe that a definition so restrictive is consistent with the plain language and intent of the CZMA.

Recommendation: Revise the definition of consistent "to the maximum extent pracitcable" to reflect the statutory language and intent.

Taken together, the several overbroad definitions in the new NOAA rules work a clearly unreasonable and unlawful expansion of the CZMA consistency review provisions. Further, the definitions in the new rule are very likely to result in microscopic scrutiny of, and new objections to, future lease sales, exploration plans, and development plans that are submitted for approval and consistency review in any situation where the local political jurisdiction is anything less than a wholehearted supporter of the particular offshore project. This in turn will result in new problems, delays, and costs that are as detrimental as they are unnecessary.

II. Conditional Concurrences

The new 15 C.F.R. 930.4 provides for the issuance by the state of a "conditional" concurrence if the state decides that conditions or stipulations are needed to ensure consistency with its enforceable policies. The federal agency is then required to incorporate those conditions into its decision or its approval of the proposed action, or immediately notify the state if the terms are not acceptable. If the agency does not accept the state's conditions, the conditional concurrence is treated as an objection. If a proponent of an exploration plan or a development plan, or an applicant for a license or permit, is unwilling to accept the state's conditions, the conditional concurrence is treated as an objection. A conditional concurrence does not appear to be authorized or permissible under the CZMA.

Section 307(c)(3)(A) of the CZMA requires that once a consistency certification is submitted to the state for concurrence, the state must concur with or object to the applicant's certification within six months. If the state does not respond within the six month period, there is a presumption of concurrence. Further, section 307(c)(3)(A) prohibits a federal official from approving any license or permit until such concurrence is obtained. Section 307(c)(3)(B) contains an analogous requirement — *i.e.*, that an agency may not issue a license or permit for an activity described in an OCS exploration or development plan until the state has concurred with the consistency certification for the plan. By its very nature, and as demonstrated below, a conditional concurrence is not a concurrence that the CZMA contemplates. It acknowledges that the state believes that the proposed activity or plan, as submitted, is not consistent with the enforceable policies of the state's approved program, but then prescribes conditions that purportedly must be met to achieve consistency.

Before the new regulations, the consistency process with regard to licenses and permits was one that generally involved the applicant and the state. That is, the applicant was required to certify that the proposed licensed activity was consistent with the enforceable policies of the state, and if the state concurred, the federal agency could go forward with the issuance of the permit or license. If the state did not concur, the applicant could appeal that decision to the Secretary of Commerce. The new regulations convolute an otherwise straightforward process in two distinct ways.

First, by requiring the applicant and the federal agency to either adopt the state's conditional language in full or reject it, resulting in a state objection, NOAA has created a process by which a state in many cases, as a practical matter, will have enough leverage to impose its will on the federal agency and usurp the federal agency's authority to oversee the content of OCS plans and licenses and

permits by simply loading a concurrence with terms and conditions. When confronted with a conditional concurrence, the applicant is forced either to accept the conditions or face the consequence of an extremely time-consuming and costly appeal process through the Secretary of Commerce. In many instances, such a process could have dire financial consequences to an applicant. When a state issues a conditional concurrence, the issue of whether the terms and conditions are logically derived from or rationally related to enforceable policies of the state becomes secondary. The process becomes one of a cost-benefit analysis on the part of the applicant.

Second, the new regulations redefine the role of the MMS in the CZMA process, with potentially confusing results. Previously, when the state concurred with the consistency determination of an applicant, the MMS simply moved forward to the issuance of licenses or permits (whether under an exploration or development plan or standing alone). If the state did not concur, the MMS was legally prohibited from issuing the license or permit until the dispute between the state and the applicant was resolved by an appeal to the Secretary of Commerce.

In the case of a conditional concurrence, however, the MMS' role has changed. Under the new regulations, if a state issues a conditional concurrence, the likely result is that MMS will have to conduct an adjudication. The regulations require the MMS to accept the conditions in total and incorporate them into the exploration or development plan or license or permit, or issue a determination that the conditions are unacceptable. If the MMS chooses the former, the decision by the state is deemed to be a concurrence. If MMS refuses to accept even one of the conditions, the decision by the state is deemed to be an objection. In effect, the MMS would be directing the outcome of the consistency process based upon its willingness to accept or reject the conditions. That is the first reason why the decision, when the state issues it, is neither a concurrence nor an objection, but rather a hybrid declaration that does not find its origin or authorization in the CZMA.

But that is not the end of the convolution of the process. If the state were to issue a conditional concurrence, with a number of conditions attached, it is foreseeable that the applicant, although it may have misgivings about whether the conditions are actually related to the enforceable policies of the state, nonetheless may agree to accept them to avoid the lengthy and costly appeals process. If the MMS, as required by the new regulations, issues a determination that the conditions are unacceptable because they do not follow from the state's enforceable policies, then the conditional concurrence is treated as an objection by the state. The applicant then is forced into the appeal process, notwithstanding the fact that the applicant was willing to accept the terms and conditions based upon time and monetary considerations.

Taking this scenario to the next step, the process becomes further confused by the question of which administrative tribunal has the authority to resolve the appellant's dilemma. Under the regulations before December 2000, because only the state issued a decision with regard to consistency, the applicant appealed the state's objection to the Secretary of Commerce. However, under the new regulations, it is the MMS (an agency of the DOI) and not the state, that has issued a decision that has resulted in an adverse impact on the applicant. It is the determination that the conditions required by the state are not tied to an enforceable policy that has led the MMS to reject

the conditions, thus resulting in an objection to the consistency of the proposed plan or activity. Generally, it is the Interior Board of Land Appeals ("IBLA") that has the administrative jurisdiction to review decisions made by the MMS. There seems to be no question that the MMS decision had an adverse impact on the applicant, because but for the MMS determination, the state's decision would have been deemed a concurrence, and the applicant would have been granted a permit. Given that the IBLA has the jurisdiction to review decisions of the MMS, and assuming that the issue to be resolved is whether the MMS determination that the conditions were not tied to an enforceable policy of the state is correct, then it would appear that the new regulations, at least in the case of conditional concurrences, in effect have delegated some of the authority previously vested in the Secretary of Commerce to the Secretary of the Interior. Obviously, the invention of the "conditional concurrence" by NOAA has created complicated issues of administrative economic extortion and conflicting jurisdiction and authority.

Even aside from these problems, there is little, if any, evidence to indicate that conditional concurrences will facilitate the consistency process. The process before the new rules encouraged states and applicants to informally discuss issues, resolve consistency problems, and develop modifications during the state's consistency review period, prior to decision. Therefore, the development of conditional concurrences adds nothing to the process, but confuses the issue by creating a "hybrid" finding that is neither a complete concurrence nor a complete objection and which only serves to confuse the issue. The terms and conditions of the CZMA do not contemplate or authorize such a process.

Recommendation: Remove the new "conditional concurrence" provisions at 15 C.F.R. 930.4.

III. Offshore Lease Suspensions

This issue has been the topic of extended discussions between NOAA, DOI, and the Justice Department, particularly in the context of the State of California's lawsuit challenging MMS' grant of suspensions of 36 undeveloped leases offshore of that State. *California v. Norton*, Nos. 01-16637 and 07-16690 (9th Cir.). NOAA affirmatively asserts in the preamble to the new rule that a suspension is a "federal license or permit" within the meaning of CZMA section 307(c)(3)(A) and (B) and the NOAA rules. 65 FR 77144.

For the reasons explained in detail in the letter from the Solicitor to the NOAA Acting General Counsel dated December 8, 1999, suspensions do not constitute "licenses or permits." Not only do suspensions not authorize or permit any activities, they in fact prohibit relevant activities. The preamble to the new rule neither refutes, nor even addresses, the substance of the analysis set forth in the Solicitor's letter. Indeed, the preamble concedes that "as a general matter, lease suspensions do not affect coastal uses or resources and do not generally authorize activities to occur during the suspension period that can be reasonably expected to affect coastal uses or resources." *Id.* That is not just true "generally." It is true universally, and no one has articulated any scenario in which it is not.

It follows that CZMA consistency certification requirements do not apply to offshore leases suspensions. The preamble's position that they may be is not tenable.

Recommendation: Revise the preamble discussion to say that on reexamination it has become clear that suspensions do not authorize or permit any activities and do not affect the coastal zone.

IV. Statutory Review Period

A Commencement of State Review Period

Under the CZMA (section 307(c)(3)(A) and (B), a state must concur with or object to a consistency certification regarding a proposed activity requiring a federal license or permit or an OCS exploration or development plan within six months, or the state is deemed to concur. Under the former rules, that time period began when the information was received by the state for review. Under the new regulations, two critical elements have been added to the process. First, section 930.58 of the new regulations adds a plethora of vaguely described information that must accompany a consistency certification, above and beyond that which is required by the federal licensing agency. Second, section 930.60(a)(1) provides that the time period for review does not start until the state receives all of the information contained in section 930.58. Sections 930.76(b) (which refers back to section 930.58) and 930.77 impose the same requirements for OCS exploration and development plans.

Under the new rule, the state becomes the arbiter of what constitutes sufficiency of the data submitted. While the state has 30 days within which to notify the applicant and the federal agency of the deficiency, the state could continue to delay the beginning of the six month review period simply by continuing to find technical deficiencies and omissions with the material presented. This is particularly likely because the regulations are so broad and ambiguous with regard to the nature and content of the information that is required.

A similar problem also exists with federal activities and federal consistency determinations. Under section 930.41, the 60-day review period allowed for state review of federal activities begins when the state agency receives the consistency determination and supporting information required by section 930.39(a). That section sets forth general requirements for information that must be submitted by the federal agency, and is extremely general and ambiguous. The adequacy of the content of the submission is entirely subject to state interpretation. Although the state is required to notify the agency immediately if the filing is incomplete or otherwise insufficient, there is no limitation on how many times the state can delay the start of the review period simply by claiming that further data or information is required and the filing is incomplete. If a state wishes to hold up a federal activity or project due to political or philosophical differences, even though the proposed activity is consistent with the enforceable policies of the state, the state effectively may avoid the consistency issue altogether for some period of time simply by requiring additional data.

Recommendation: Revise the rule to provide that the consistency review period begins when the state receives all the information required under the licensing or permitting agency's rules. Neither the state nor NOAA should be the arbiter of the sufficiency of the information submitted, and the information requirement should be objective rather than subjective.

B. Interruption of State Review Period

The new 15 C.F.R. 930.60(a)(3) purports to allow the State and a permit applicant to mutually agree to stop the statutory 6-month review period. This is simply *ultra vires* and beyond NOAA's authority.

Recommendation: Remove the provision.

V. Improper Assumption of Authority by NOAA Regarding Exploration Plans and Development and Production Plans

In the new 15 C.F.R. 930.76(b), NOAA effectively assumes the power to prescribe what information must be submitted with an EP or a DPP, instead of the information required under MMS rules. NOAA has no authority to do this.

Recommendation: Revise section 930.76 to make clear that MMS prescribes what information must accompany an EP or DPP.

VI. Deference to State in Determining "Substantially Different Coastal Effects"

The new 15 C.F.R. 930.51(b)(3) provides that a renewal or major amendment of activities requiring a federal license or permit that a state agency previously reviewed must go through consistency review if it "will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency." A similar concept is incorporated into the definition of "major amendment" in section 930.51(c). However, section 930.51(e) then provides that "[t]he opinion of the State agency shall be accorded deference" in determining whether there are substantially different coastal effects.

This provision provides an avenue for states that are opposed to a particular activity for reasons unrelated to the actual effects of the activity to demand consistency review under circumstances where it is clear that there will be no substantially different effects from any renewal or amendment of that activity. The conduct of the State of California before and during the *California v. Norton* litigation is a powerful illustration of the potential for unnecessary problems that this provision creates.

Recommendation: Revise section 930.51 to make clear that the licensing or permitting federal agency makes the ultimate determination of whether there are substantially different effects.

VII. State Agreement that Insignificant Effects are Insignificant

NOAA apparently asserts in 15 C.F.R. 930.33(a)(1) that the whole consistency process must be employed even if the "effects" are insignificant or insubstantial. (65 FR 77129, 77130, 77135.) The *de minimis* provision in section 930.33(a)(3) requires that the state agree that an activity is *de minimis*. In other words, no effect is too small unless the state says so.

A state veto over a *de minimis* provision makes it unreliable in practice, and does not facilitate practical implementation of the statute. Congress presumably was not interested in Federal agencies or states expending substantial resources on insignificant issues, but the structure of the *de minimis* provision creates an express avenue for a state to compel wasteful expense.

Recommendation: Revise the *de minimis* provision to remove the requirement that the state agree that insignificant effects are insignificant.